No. 21766

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VERNON O. WHITE AND INA C. WHITE, Appellants

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION

BRIEF FOR THE APPELLEE

FILED
FEB 1 1968
WM. B. LUCK, CLERK

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OPINION BELOW

The district court's unreported memorandum decision appears at pages 92-95 of the transcript of record.[1/]

JURISDICTION

Jurisdiction of the district court was sought to be invoked under the Administrative Procedure Act, 5 U.S.C. sec. 701 et seq. (formerly 5 U.S.C. sec. 1001); the Declaratory Judgments Act, 28 U.S.C. secs. 2201 and 2202; and the mandamus statute,

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1/ The transcript of record prepared by the clerk will be referred to as "R." The reporter's transcript of the hearings before the Bureau of Land Management of the Department of the Interior will be referred to as "Tr."

28 U.S.C. sec. 1361. We contend the only jurisdiction of the district court was under 28 U.S.C. sec. 1361.[2/] Judgment was entered on January 6, 1967 (R. 95). Notice of appeal was filed on February 24, 1967 (R. 97). The jurisdiction of this Court rests upon 28 U.S.C. sec. 1291.

QUESTION PRESENTED

Whether there is support in the record and the established federal mining laws for the Secretary of the Interior's decision rejecting appellants' application for a patent to lands in the Payette National Forest on the ground that no valuable mineral discovery has been shown.

2/ The Government does not agree with this Court's decision in Coleman v. United States, 363 F.2d 190 (1966), aff'd on reh 379 F.2d 555 (1967), cert. granted, 389 U.S. ___ (Dec. 4, 1967) Since the Supreme Court has granted certiorari in that case, nothing would be gained by further discussion of the applicability of the Administrative Procedure Act. The Government's position, that the only basis upon which a court can review a decision of the Secretary of the Interior is under the mandamus standard of 28 U.S.C. sec. 1361, has been sufficiently preserved and articulated in the Supplemental and Replacement Brief submitted to this Court in the Coleman case (March 1967).

As to the Declaratory Judgments Act, this Court, in White v. Administrator of General Services Admin. of U.S., 343 F.2d 444 (C.A. 9, 1965), held that the Declaratory Judgments Act does not confer jurisdiction on the federal district courts.

STATUTE INVOLVED

Section 1 of the Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. sec. 22, provides:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

STATEMENT

In 1923 and 1924, the appellants located two placer mining claims within the Payette National Forest (Tr. 153). In 1959, appellants filed an application for a mineral patent with the Bureau of Land Management. Adverse proceedings were instituted at the request of the Forest Service of the Department of Agriculture. After a hearing, and at all subsequent stages of review within the Department of the Interior, the patent application was rejected and the claims were declared null and void for lack of a valid discovery. In rejecting the application and voiding the claim, the Secretary stated (R. 14):

> The incredibility of the appellants' contention that they have made a discovery is perhaps most clearly pointed out by the testimony they elicited from their own witnesses that in 1923 and 1924 there existed on the claims mineral deposits that could have been developed by a prudent person with a reasonable prospect of success (Tr. 97, 135-136, 204-205). If this were so, it passes belief that in the 38-39 years elapsing until the hearing appellants mined only 6 ounces of gold. How long were they going to wait before commencing a mining operation, and, more importantly, why were they waiting? The answer seems plain - that they have not yet found any values sufficient to warrant development.

The relevant facts as set out in the Secretary's decision are (R. 11-12):

> Two government mining engineers, G. R. Plumb and Vernon Dow, examined the claims and took 14 samples of material thereon. They sampled every discovery point suggested by the appellants (Tr. 15, 69) and also other places selected by themselves (Tr. 69). The examination by Plumb and certificate of assay for these samples showed an estimated value of a low of .6 of a cent per cubic yard to a maximum of about 2 cents per cubic yard of material. The average was less than one cent per cubic yard (Tr. 41-43, 53-60, Exhibits 9, 11). Samples taken from the appellants' workings failed to indicate any significant values (Tr. 55, 57-59, 79-80). Plumb testified that the quality and quantity of materials found were negligible, that mining would not be economically feasible (Tr. 70), and that a prudent man would not be justified in a further expenditure of time and money on either of the claims with a reasonable expectation of developing a paying mine (Tr. 71). Dow concurred (Tr. 88).

Three mining engineers examined the claims for the mining claimants, Bill Harris, Ernest Oberbillig, and Mark Evans. Each sampled the claims and each found some fine gold in the samples. Harris concluded that the deposit was not extensive but was sufficient to justify a small operation (Tr. 96). Evans, a geologist and mining engineer, believed that since gold was found on the surface it was a good indication that pay gravel would be found at depth or at bedrock, although he stated that there was no certainty of it (Tr. 205). Oberbillig made the most thorough examination of the three. He divided the two claims into five parcels (see Exhibit H). He shaded portions of each claim to indicate where he believed placer gravel deposits existed. After sampling parcel No. 1, which is on the western end of the Rubarbe 3/ Additional No. 2 claim, he stated that mining in this area is questionable because of the limited amount of placer gravel remaining in this area (Tr. 114). His examination revealed a very limited quantity of placer gravel on parcel No. 2--possibly 5,000 yards (Tr. 115); parcel No. 2 comprises about one-fourth of the western end of the Ruewbarb claim. Parcel No. 3, which comprises the remaining part of the Ruewbarb claim, has about 30,000 yards of minable gravel (Tr. 123). Parcel No. 4, which covers the largest area of the Rubarbe Additional No. 2 claim, has only about 600 or 700 yards of minable gravel, and parcel No. 5, located along the eastern line of the Rubarbe Additional No. 2 claim, has 800 to 1,000 yards of minable gravel (Tr. 125). Oberbillig concluded that only parcel No. 3 on the Ruewbarb claim would support a mining operation and then only a one- or two-man operation (Tr. 135). His opinion of the material in the discovery cut

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3/ Rubarbe and Ruewbarb refer to two different claims.

on the Ruewbarb claim was that the gravel in the pit was very good material for concrete gravel, but it was not essentially a strong mineral carrier (Tr. 127). Based on his examination, Oberbillig concluded that parcel No. 3 on the Ruewbarb claim is conducive to a one- or two-man operation, but that the prospects of operating a paying mine on the Rubarbe Additional No. 2 are questionable (Tr. 135, 136).

It is apparent that what exists on these claims, from the results obtained by both the mining engineers for the Government and appellants, is some fine gold and small values not sufficient to justify a prudent man to undertake a mining operation.

The certificate of the assays of two samples taken by mining claimant Vernon White (Exhibits N, O) showed exceptionally high values ($9.62 per ton and $560 per ton). They were so far in excess of the values recovered by the mining experts who testified for him that his sampling cannot be considered to be representative and little probative value can be given to it. This is further evidenced by two statements by White. He testified that he had recovered only six ounces of gold since 1924, and, further, he stated that the claims are not ready to pay at this time (Tr. 184). These statements certainly must cast considerable doubt on the results of his sampling.

Appellants filed this suit, seeking review of the Secretary's decision, reinstatement of their mining claims and issuance of a patent (R. 4-7). The district court, after reviewing the entire administrative record, gave the following summary of the evidence presented at the hearing (R. 94-95):

> At the hearing before the examiner, the defendant accepted the burden of producing a prima facie case to support the contest against the patent application. Two qualified mineral examiners related the tests and examinations made by them and the results thereof. They testified to a finding of negligible valuable minerals present on the claims. Each then, as an expert, expressed the opinion that a prudent man would not be justified in expenditure of additional time or money in an effort to develop a paying mine on plaintiffs' claims. They were positive that valuable mineral was not present in sufficient quantity to justify further exploration or work and that the land was not mineral in character.
>
> After the presentation of the foregoing testimony, the plaintiffs undertook to prove the existence of a valid discovery and that the land was mineral in character. The evidence so produced by the plaintiffs tended to support plaintiffs' position. However, plaintiffs' evidence was far from overpowering. At most it put the matter at issue.

The court affirmed the decision of the Secretary on the grounds that (R. 95):

> Where the evidence is conflicting, but the findings of the Secretary are based on substantial evidence, those findings are binding on this Court. Clearly the findings that the claims in question were not supported by a valid discovery and that the land is nonmineral in character are based on substantial and competent evidence. On this record the Secretary's order must be sustained.

Judgment in favor of the Secretary was entered January 6, 1967 (R. 95), and this appeal followed (R. 97).

SUMMARY OF ARGUMENT

I

The Secretary, in determining whether appellants ha made a valuable mineral discovery as required by the Act of 1872, supra, p. 3, properly applied the "prudent man" test of Castle v. Womble, 19 L.D. 455, 457 (1894). Embraced within that test is the requirement that claimants show that, if mini operations are continued, there is a reasonable prospect that it will be a profitable venture. In the present case, there was substantial evidence to support the Secretary's decision that there was no valid discovery, and therefore his decision is binding on this Court.

II

There is no merit to appellants' other contentions. The worth of a claimant's labor is an essential consideration in determining whether he has made a valuable discovery. No geological inference of discovery is available from the disco ery of six ounces of gold in 40 years of mining. Administrat delay does not validate an invalid mining claim.

ARGUMENT

I

THE SECRETARY OF THE INTERIOR APPLIED THE CORRECT STANDARD FOR DETERMINING WHETHER A VALID DISCOVERY HAD BEEN MADE AND HIS DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE

A. The Secretary applied the "prudent man" test in determining the validity of the discovery in this case. - That standard, as first articulated by the Secretary in Castle v. Womble, 19 L.D. 455, 457 (1894), was that:

> * * * where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

At an early date, the Supreme Court, in Chrisman v. Miller, 197 U.S. 313, 322 (1905), adopted the "prudent man" test as the correct standard by which to satisfy the requirements of the statute. The Court reaffirmed its adoption of the "prudent man" test in Cameron v. United States, 252 U.S. 450, 459 (1920). More recently, the Court, in Best v. Humboldt Mining Co., 371 U.S. 334, 336 (1963), again cited with approval the test enunciated in Castle v. Womble. As shown in his opinion (R. 12), and appellants (Br. 4), the Secretary did apply the "prudent man" test in his decision rejecting their application for patent.

While not controverting the foregoing, appellants seem to urge that the Secretary erred in considering whether a "profitable venture may reasonably be expected to result" (Br. 12).

The reasonable expectation of a "profitable venture" necessarily is embraced in the basic requirements of the "prudent man" test set out in Castle v. Womble. The Court, in Chrisman v. Miller, 197 U.S. 313, 322 (1905), said "* * * 'The mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral' * * *." In Diamond Coal Co. v. United States, 233 U.S. 236, 239-240 (1914), Mr. Justice Van Devanter further defined the character of a valid discovery of a valuable mineral deposit when he stated that, for land to be valuable for minerals, "* * * it must appear that the known conditions at the time of those proceedings were plainly such as to engender the belief that the land contained mineral deposits of such quality as would render their extraction profitable and justify expenditure to that end." [Emphasis added.]

This Court, in Mulkern v. Hammitt, 326 F.2d 896, 897 (1964), and in Adams v. United States, 318 F.2d 861, 870 (1963), recognized that the "prudent man" test encompassed consideration of the reasonable expectation of a profitable venture. In Adam

v. United States, this Court said (p. 897):

> In applying this test [the prudent man test] evidence as to the cost of extracting the mineral is relevant and evidence of that character was submitted by Adams as well as the Government. The agency properly considered this evidence, not to ascertain whether assured profits were presently demonstrated, but whether, under the circumstances, a person of ordinary prudence would expend substantial sums in the expectation that a profitable mine might be developed. The agency did not, in this regard, apply an improper standard.

So here, the Secretary of the Interior applied the proper standard and did not err in considering the reasonable expectation of a profitable venture in applying that standard.

B. The Secretary's decision was based on substantial evidence. - This Court, in Henrikson v. Udall, 350 F.2d 949, 950 (1965), discussed the "substantial evidence rule," and the propriety of applying it to mining cases. The Court said:

> It is the function of neither this court nor of the District Court, in a proceeding such as this, to weigh the evidence adduced in the administrative proceeding. Rather, if upon review of the entire record of that proceeding there is found substantial evidence to support the Secretary's decision, that decision must be affirmed. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951), Foster v. Seaton, 106 U.S.App.D.C. 253, 271 F.2d 836 (1959).

See also Pan American Petroleum Corporation v. Udall, 352 F.2d 32, 35 (C.A. 10, 1965), and Morgan v. Udall, 306 F.2d 799 (C.A. D.C. 1962).

The Secretary in his discussion has carefully reviewed the evidence presented before the Hearing Examiner. This review contains extensive references to the transcript of proceedings before the Hearing Examiner and quotes from that record (R. 17-26). A reading of the Secretary's discussion of the testimony offered by both parties, and his analysis of it, shows without question that his decision was based upon ample supporting evidence in the record. Since the decision of the Secretary explains in considerable detail the basis in fact for his decision, no further review of the evidence is necessary here. We submit that the evidence reviewed, upon which his decision was based, is substantial and fully supports his decision.

II

THERE IS NO MERIT TO APPELLANTS' OTHER CONTENTIONS

Since there is plainly no merit to the other arguments made by appellants, we will treat them summarily.

Contrary to appellants' contention, labor should and must be considered in determining whether it may "reasonably be expected" that a mining operation will be a "profitable venture." The man of ordinary prudence in Castle v. Womble, is one who expends both "his labor and means." The worth of the labor

expended is an essential ingredient of the test. Surely no prudent man would be justified in working eight hours a day to earn 50 cents over his out-of-pocket expenses. Only a man with no other market for his labor would be warranted in pursuing such a course. Fortunately, this is not the situation of the appellants in this case (Tr. 152), and such a unique man could not fit the ordinary prudence test.

Contrary to appellants' contention, geological inference will not satisfy the requirements of a discovery of a valuable mineral deposit. E.g. Chrisman v. Miller, 197 U.S. 313, 322 (1905); Oregon Basin Oil & Gas Co. v. Work, 6 F.2d 676, 678 (C.A. D.C. 1925). In any case, the extraction of only six ounces of gold in 40 years of mining (Tr. 165) seems to defeat any reasonable geological inference.

Appellants have not suffered prejudicial delay in pursuing their administrative remedies. It was their responsibility to show a valid discovery. They have had over 40 years in which to do it. The delay they claim to have suffered in the light of this, as well as the substantial case load under which the various levels of the Department of the Interior operate,

makes the appellants' contention de minimus.[4/] In any event, administrative delay does not validate an invalid mining claim so as to require disposal of the public domain contrary to statute.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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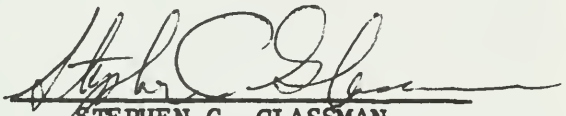
JANUARY 1968.

4/ In fiscal year 1967, the seven Hearing Examiners of the Bureau of Land Management handled 841 claims, held 160 hearing and rendered 287 decisions. The Office of Appeals handled 871 appeals and rendered 507 decisions. Appeals to the Secretary of the Interior in Bureau of Land Management cases number 265. The Secretary rendered 217 decisions in BLM matters.

CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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